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Employer Negligent Hiring:

Where does the Responsibility Lie?

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by

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ABSTRACT (100-200 WORDS): The purpose of this project was to present information on employer liability for the offenses of their employees under the negligent hiring doctrine. Four theories under which employer may be held liable--respondeat superior, negligent entrustment, negligent hiring, and negligent retention--are discussed here in depth. In addition, the criteria for demonstrating negligent hiring or retention are ~~is~~ reviewed. Furthermore, the duty to check criminal records and the availability of criminal records is discussed. And finally, specific guidelines are presented for defending against a negligent hiring claim and minimizing or avoiding negligent hiring liability.

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Abstract

The purpose of this project was to present information on employer liability for the offenses of their employees under the negligent hiring doctrine. Four theories under which employers may be held liable--respondeat superior, negligent entrustment, negligent hiring, and negligent retention--are discussed here in depth. In addition, the criteria for demonstrating negligent hiring or retention is reviewed. Furthermore, the duty to check criminal records and the availability of criminal records is discussed. And finally, specific guidelines are presented for defending against a negligent hiring claim and minimizing or avoiding negligent hiring liability.

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Preface

This thesis is the result of my deepening interest in the many areas surrounding employment law. Over the past four years, I have begun to educate myself about the many potential threats to an employer in negligent hiring and retention cases. As a future human resource manager, I recognize the importance of a well-defined negligent hiring doctrine. In order to further educate myself and other employers in the business environment, I have chosen to research this particular area of employment law.

Recently several court cases have addressed the issue of employer's liability for the negligent hiring and retention of employees who engage in criminal or violent acts. In many negligent hire cases, the courts determined that the employers were liable for substantial monetary damages.

This new theory of employer liability for negligent hiring and retention is one of the fastest growing areas of employment law. A majority of states have recognized a "cause for action" for either negligent hiring or retention, and the trend is clearly toward acceptance of the doctrine and further expansion of employer liability for injuries caused by employees.

This thesis presents the reader with an overview of theories leading to the negligent hiring and retention doctrine and court outcomes in some important cases.

Particular attention is focused on those cases where the criminal conviction record of an employee was at issue and ultimately important in the disposition of the case. In addition, the matter of the availability of criminal record information is discussed. Finally, some conclusions and practical recommendations are presented, including a call for Congress to pass appropriate legislation to make criminal information available to employers who need to know.

Introduction

Many jobs in today's economy require an employee to associate with the general public on a regular basis. These jobs range from waiters, hairdressers, and shoe salesmen, to teachers, delivery people, and apartment managers. There is, however, a major difference between these two groups of workers. In the first group, the employee normally interacts closely with his employer or supervisor while carrying out his duties. While employees in the second group typically interact with the general public on a frequent and usually unsupervised basis. Consequently, in this latter group there is greater potential for a dangerous individual to victimize the general public. Allowing a convicted rapist to deliver pizzas is an example. A citizen opens her door expecting to find a pizza, and is instead confronted by someone with a propensity for rape. If the individual then commits rape, in some states current

liability rules preclude holding the employer liable for the employee's tortious act. When the rapist has no money, the victim has no effective remedy for her medical expenses or her pain and suffering.

In another example, let us assume that an employer is seeking to fill a job position in which the new employee will have a great deal of contact with the public. The owner narrows her decision to one candidate and decides to hire him. The owner very much likes the job candidate and because of time constraints and other priorities sees no need to contact references or former employers. In particular, the business owner decides not to investigate a six-month gap in the job candidate's employment history. The candidate is hired and works well and with enthusiasm. However, after four months of calling on customers, the employee assaults and batters a prospective customer. It seems the two had gotten into an argument and a fight had ensued. The prospective customer sues the employer, and wins. It is brought to public attention for the first time at trial that the employee had been fired from a previous job for this same type of incident and had been unemployed for six months (the gap in the employment history on the application). It is also indicated at trial that had the present employer investigated the new hire's background, she would have discovered this information and the fact that, when under extreme stress, the new employee had a tendency

towards violence, if provoked.

Incidents quite similar to the ones describe above have occurred and resulted in successful cases against employers. Employers should understand the basis of negligent hiring, liability, the process for defending such claims, and how to avoid such potential lawsuits. That is why I have chosen to examine the law as it stands today.

At the present time, the negligent hiring doctrine is recognized in at least twenty-nine states and thus may be considered the law of the land.[1] A review of claims based on negligent hiring theory in state courts shows that most such claims have been filed in the past eight years.[2] Suits that assert negligent hire and originate in the federal courts will no doubt be subject to the relevant state case law.

An Overview of Theories Giving Rise to Employer Liability for Employee Actions

An employer may be held responsible for the torts of its employees under several distinct theories, namely: respondeat superior, negligent entrustment, negligent hiring, and negligent retention. It is important to distinguish among these theories because each has its own requirements for proof. More than one theory may be used in any given case, however.

Respondeat Superior

For an employer to be held liable under the doctrine of respondeat superior, an employee must be acting within the scope of his or her employment and in the furtherance of the employer's business when the tort is committed. Furthermore, the employee must have been negligent when committing the tortious acts, and that negligence must have been the proximate cause of the plaintiff's injuries. Under this theory, the care with which an employer selects an employee is irrelevant to the outcome of the case, although an employer-employee relationship must exist. The test for the existence of an employer-employee relationship is whether the principal (the employer) has the right to control the actions of the agent (the employee).[3] However, since it is often difficult to show the existence of an agency relationship or that the accomplishment of the tort was aided by the relationship, an employer will often escape liability.[4] Punitive damages are not allowed in respondeat superior cases unless the employer requested, encouraged, or condoned the tortious act of its employees.[5]

Negligent Entrustment

The doctrine of negligent entrustment makes individuals potentially liable when they loan property or equipment to others who, not competent during its use, injure a third party. In this situation, no proof of an employment

relationship is required.

Negligent Hiring

Negligent hiring, as a theory of law, developed as an extension of the fellow servant rule, which holds that an employer is obligated to provide employees a safe place to work. A safe work environment was understood to include having competent and well-trained co-workers. If the employer breached this duty by hiring an unfit worker, an employee injured by his co-worker could recover for his employer's negligence. Today this type of lawsuit would most typically be handled by workers' compensation courts.

The elements of negligence in such cases are relatively straightforward. The employer owed his employee a duty to provide a safe workplace; the employer violated this duty by hiring an employee he knew or should have known had a propensity to become violent; the employee was injured; and the injury could have been avoided if the employer had exercised care in the selection or retention of the unqualified employee.

One of the earliest cases to recognize the doctrine of negligent hiring was *Missouri K & T Railway Company of Texas v. Day.*[6] In that case, while at work an employee attacked the plaintiff, Day, with a knife. The court held that the employer had breached its duty to use reasonable care in the selection of its workers. The court stated that the

employer was aware of the possibility of an attack by the employee, thus emphasizing the employer's duty to hire fit employees and, hence, maintain a safe workplace. Subsequently, courts have extended the concept of direct employer liability to include a duty to exercise reasonable care for the safety for the general public when hiring or retaining employees. Moreover, an employer's liability for its employees' acts has been extended to acts committed *outside* the scope of employment.

As one court stated:

> The negligent hiring and/or retention doctrine recognizes that an employer has a duty to use reasonable care in the selection and retention of employees. This duty requires that an employer hire and retain only safe and competent employees. An employer breaches this duty when it hires or retains employees that it know or should have known are incompetent.[7]

Hence, unlike the doctrine of respondeat superior, negligent hiring does not have to occur within the scope of his or her employment. It only means the employer may be liable for its primary negligence in hiring or retaining the offending employee.

Negligent Retention

Negligent retention cases are so similar to negligent hiring that the two doctrines may be considered together for the purpose of this thesis. In *Foster v. Loft, Inc.*,[8] the Massachusetts appellate court defined negligent retention in this manner:

> Negligent retention...occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further action such as investigation, discharge or reassignment.

In *Foster*, the court found evidence of negligent retention when the Loft, a cocktail lounge, hired and retained a bartender who it knew had a criminal record of assault, and battery with a dangerous weapon. The plaintiff, Foster, had filed suit against the Loft when he was punched by the bartender after complaining about the quality of the drinks. It was concluded by the court that the acts previously committed by the bartender were similar to those which had caused Foster's injuries.

Similarly, in *Lindsey v. Winn Dixie Stores, Inc.*,[9] a store manager, Lindsey, was accused of stealing by a security guard, Whitehead. Lindsey reported his accusation to management, and Whitehead apologized. Moreover, other employees had reported to management that Whitehead had threatened them with violence, but no disciplinary action was taken. Some months later, Whitehead accused Lindsey of calling him "stupid." Lindsey denied this and considered the matter closed. Nonetheless, Whitehead assaulted Lindsey the following day which resulted in unconsciousness and a fractured jaw, lacerated chin, and the loss of three teeth. The court held that Winn Dixie Stores was guilty of negligence for having allowed Whitehead to continue work "

with the knowledge of his alleged violent propensities."

Criteria for Demonstrating Negligent Hiring or Retention

Normally, a plaintiff bringing a negligent hiring or retention claim has the burden of proving five factors:

1. The existence of an employment relationship;
2. The employee's incompetence;
3. The employer's actual or constructive knowledge of such incompetence;
4. The employee's act or omission causing the plaintiff's injuries; and
5. The employer's negligence in hiring or retaining the employee as the proximate cause of plaintiff's injuries.[10]

Existence of an Employment Relationship

Unlike proofs in negligent entrustment cases, issues involving negligent hiring and/or retention and respondeat superior commonly require that an employment relationship must exist as a precondition to employer liability. Several criteria have been applied to determine the existence of an employment relationship. These include whether the employer directs the worker in the performance of the work, selects and hires the workers, pays the wages, and has the power of dismissal, as well as whether the work is part of the regular business of the employer, and whether the parties believe they are creating an employment relationship.[11]

On the one hand, usually employers who hire independent contractors are not liable to others for the negligence of the independent contractor. However, there are three situations in which an employer that hires an independent contractor may be liable for injury. They are the following:

1. When the person who hires the independent contractor retains control over some part of the work, the person who hires the contractor owes a duty to employees of the contractor within the scope of that control, to provide a safe place to work. Failure to do so is negligence.

2. When the injury to the independent contractor's employee is caused or contributed to by an act or omission of the contractor pursuant to negligent orders or directions given by the person who hired the contractor.

3. When the person who hires the independent contractor does not exercise reasonable care to hire a competent and careful contractor in circumstances that will involve a risk of physical injury unless it is skillfully and carefully done.

The words 'competent and careful contractor' mean a contractor who possesses the knowledge, skill, experience, personal characteristics and available equipment which a reasonable person would realize that a contractor must have in order to do the work which he is employed to do without creating an unreasonable risk of injury to others.[12]

Employee's Incompetence

A plaintiff, under the negligent hiring or retention theories, must be able to demonstrate that the employee was unfit for the job and posed an unreasonable risk to those members of the public who would foreseeably come in contact

with that employee. For example, in *Gaines v. Monsanto Co.*,[13] an employee of the Monsanto Company, who worked as a mail clerk, murdered another employee of the company, a secretary, at her apartment. The mail clerk, in the course of his employment, had opportunity to circulate among the employees and learn their names and home addresses. Moreover, he had a reputation for harassing and making advances toward female employees and had previously been convicted of rape and robbery. Consequently, the Missouri Appellate Court found that Monsanto had been negligent in hiring and retaining such an unsuitable employee.

However, the mere fact that an employee has been convicted of a crime does not automatically render the employee "incompetent." In *Cramer v. Housing Opportunities Commission*,[14] the Maryland Court of Special Appeals noted that:

> Were employers required to investigate whether a prospective employee had a criminal record, a positive finding would inevitably lead to the applicant's not being hired. Aside from the fact that a criminal record might well become a one-way ticket to poverty, such a policy has other effects. The costs of employing a person would rise because of the costs of the investigation. It takes no social scientist or behavioral expert to recognize that such a policy will undermine society's concept of rehabilitation of criminals in favor of the idea once convicted, forever condemned.

In *Cramer*, the plaintiff, who had been raped by an employee of the county housing commission, had argued that the failure to verify the existence of the employee's

criminal record was negligent on the Commission's part. The Maryland court stated that an employer has no obligation to check the criminal records of all prospective employees, only those with particularly sensitive jobs, such as guards.

The Employer's Knowledge of Employee Incompetence

Whether or not an employer is aware of an employee's criminal record or incompetence does not necessarily imply negligence on its part. As the Supreme Court of New Jersey indicated in *DiCosala v. Kay*,[15] the real test of employer negligence is as follows:

> Whether or not probable harm to one in the position of the injured plaintiff should reasonably have been anticipated from defendant's conduct. Thus the issue of duty owed to a plaintiff is a question of foreseeability.

In *DiCosala*, a six-year-old boy, Dennis DiCosala, was accidently shot in the neck by Robert Kay. The accident occurred in the living quarters of the plaintiff's uncle, Phillip Reuille, which were located on the grounds of Camp Mohican, a Boy Scout Camp. Reuille had been hired as a camp ranger, and his duties included repair work, maintenance chores, and other general work. His quarters were regarded as private and he was permitted to entertain private house guests.

The plaintiff and his mother were visiting Reuille's house when a camp counselor, Robert Kay, and another invitee, found a handgun in a holster on the fireplace

mantel. Kay pointed the gun at the boy in jest and then pulled the trigger, apparently assuming the gun was not loaded. Dennis, struck in the neck, suffered "severe and crippling injuries." The revolver used in the shooting was not the only gun on the premises. There were two rifles and another revolver that was later discovered by the police. A camp administrator testified that he was aware that Reuille entertained private guests in his quarters and of the fact that there were firearms at the Reuille home.

Although the trial and appellate courts granted judgement in favor of the Boy Scouts, the New Jersey Supreme Court reversed on the basis of negligent hiring and retention. This court pointed out that the Boy Scouts were aware that Reuille possessed guns at his home and that they provided him with lodging on the camp grounds. The court also noted that, although these lodging were generally not accessible to other persons, the Boy Scouts knew that individuals might be there. It stated:

> Though plaintiff's presence at Reuille's lodging was not technically a circumstance within the actual scope of employment or an incident to the performance of employment duties, plaintiff clearly was exposed to the 'enhanced hazard' and fell within the 'zone of risk' created through the defendants' employment of Reuille and the dangerous condition that existed at the Reuille home which was furnished as part of his employment. As such, harm to the plaintiff was foreseeable.

On the other hand, employers are not responsible if there is no reason to foresee harm, or if there is no

relation between the unlawful act and the job. For example, an Illinois women, raped by an off-duty deputy sheriff could not sue for negligent retention because she could not show that her injuries were related to the deputy's employment.

In the case of *Evans v. Morsell*[16], an employer was held not liable for injuries sustained by a customer after the bartender assaulted her. The court held that no criminal record inquiry is required by a tavern owner who checked with the prior owner about the character of the bartender. The customer sued a tavern owner for damages resulting from personal injuries sustained when the tavern's bartender shot the customer. The bartender had a prior criminal record of which the defendant was not aware. The defendant purchased the tavern, however, and the bartender was recommended by the former owner as a good worker and a person who the defendant should employ.

The court found that the employer's investigation was sufficient to avoid a breach of duty, notwithstanding the failure to inquire into the bartender's criminal record, since the inquiry did not reveal any facts that placed or should have placed the tavern owner on notice that the employee was potentially dangerous. Accordingly, the tavern owner was not liable under the doctrine of negligent hiring.

In a case with a pending proceeding, *Doe v. Am. Airlines*,[17] a plaintiff recently filed suit in state court in Illinois charging American Airlines with the negligent

hiring of a boarding agent who later tested positive for the AIDS antibody. The complaint seeks $12 million in damages. The plaintiff alleged that she arrived at O'Hare Airport only a few minutes prior to the time her flight was scheduled to depart. The ticket agent advised her to proceed directly to the departure gate. At the gate the boarding agent refused to allow her to board the flight because she had no boarding pass. The passenger protested and the boarding agent closed the door to the jetway. When the passenger asked for the agent's name he refused to tell her and she grabbed his arm. According to the complaint, the agent then kicked the passenger in the shins and bit her hand.

Upon the passenger's request the airline tested the boarding agent for the AIDS antibody, and the result was positive. The passenger, who now claims that she is in deadly fear for her life, sued the airline. The complaint charges that, as a common carrier, the airline had the highest duty to safeguard its passengers from health and safety risks and that American Airlines "knew or should have known that [the agent] had been exposed to a deadly virus and that he is a violent person and unfit for this job."

The decision on this case has not been reached yet but the fact pattern poses a serious threat for all employers. If judgement is found in favor of the plaintiff then it would mean employers would be responsible for knowing that

their employees carried a deadly virus such as the AIDS antibody. This issue poses many serious questions to employers and it will be interesting to see how the development of this case affects AIDS testing and the business environment in the future.

Employee's Acts as Proximate Cause of Injury

Assessing whether or not an employee was the cause of injury and whether the employer's negligent hiring or retention of the unfit employee proximately caused the injury are essentially issues for a jury to determine. The Minnesota Supreme Court has outlined the test for proximate cause in negligent hiring cases. In *Ponticas v. K.M.S. Investments*,[18] the court held that:

> For negligence to be the proximate cause of an injury, it must appear that if the act is one in which the party ought, in the exercise of ordinary care, to have anticipated was likely to result in injury to others, then, he is liable for any injury proximately resulting from it, even though he could not have anticipated the particular injury which did happen.

In *Ponticas*, the court determined that the employer did not fulfill his investigative duty before hiring Dennice Graffice as an apartment building manager. On September 10, 1978, Mr. Graffice violently raped, at knifepoint, a tenant after entering her apartment with his passkey.

The employer was unquestionably negligent in failing to use reasonable care in investigating Mr. Graffice before hiring him. Mr. Graffice received a general discharge from

the army in November of 1973. He was jailed for receiving stolen property in California in 1974. Upon his release from jail, he moved to Colorado, was convicted of armed robbery and burglary, and was sentenced to prison. He was released in June of 1977 and moved to Minnesota in January of 1978. He was on parole in Minnesota, following the Colorado conviction, when he applied for the job as resident manager of the defendant's apartment complex. On the employment application, Mr. Graffice listed two references and stated that he had previously been convicted only for "traffic tickets." The defendant never questioned or investigated Mr. Graffice's responses to these answers on the employment application.

In determining the scope of the employer's investigative duty, the *Ponticas* court began its analysis with the principle that an employer will be held liable only for evidence that would be discovered in a reasonable investigation. The issue then became whether the employer did, in fact, conduct a reasonable investigation. The court concluded by stating that there was no defined rule of liability where the employee has a criminal record because this would frustrate the goal of assimilating rehabilitated criminals into society.[19] Therefore, liability must be based on "the totality of the circumstances surrounding the hiring" in determining whether the employer fulfilled his duty of using reasonable care.

The court then applied the "totality of the circumstances" standard. The defendant was held liable under a negligent hiring theory for the following reasons: (1) contacting the references would have revealed that they were Mr. Graffice's mother and sister, references that the court determined were not appropriate; (2) Mr. Graffice's lack of employment since his discharge from the army was never questioned; (3) the defendant admitted that she would not have hired Mr. Graffice, had she known of his criminal record, because of the risk of harm involved; and (4) if the defendant had contacted the Minnesota Department of Corrections, she would have learned of Mr. Graffice's parolee status.

The court determined that the tenant had met Graffice as a direct result of his employment as apartment manager, and while he was performing his duties of making repairs. Two days before the rape, he had fixed her refrigerator and had found out her husband was out of town. It concluded that the property owners did have the duty of exercising reasonable care in hiring a resident apartment manager.

Although Graffice had no past record of sexual assault, the court held that it was reasonably foreseeable that someone with his background could commit a violent crime and that it was not necessary that the particular crime or type of offense or injury be foreseeable. The court concluded that an employer would not be liable for failure to discover

information undiscoverable by reasonable investigation but held that what constitutes "reasonable investigation" depends on the nature of the employment and the resulting risk to third parties by an incompetent or criminal employee. Where an employee like Graffice is to be given access to people quarters with a pass key, this duty to investigate is much greater than for other positions involving less trust and less risk of harm to others.

The court stressed that it was not holding that all employers must inquire about prospective employees' criminal records. Nor did it hold that employers should never hire people with criminal backgrounds lest the employers be automatically liable for a subsequent assault. Liability depends on whether the employer exercised reasonable care "in the totality of circumstances surrounding the hiring."

Thus, proximate cause of injury is an issue related to, but independent of, "foreseeability." The question is whether or not the employer's negligent hiring or retention created the conditions. Similar to the example in *Ponticas*, in the case of *Pittard v. Four Seasons Motor Inn, Inc.*,[20] a boy was sexually assaulted by an on-duty employee of a hotel at which the boy and his parents were guests. The employee was working as a steward, assisting in the preparation of banquets. He admitted being intoxicated when he reported to duty. The appellate court found that the hotel was aware, or should have been aware, that the steward had a drinking

problem and had a propensity for violence because he had been terminated for drinking by the hotel before the assault. When he later returned to the hotel to ask for his job back, he was intoxicated and was forcibly asked to leave. Yet, he was rehired and not closely supervised despite the fact that he had access to alcoholic beverages. Even though the homosexual assault was not directly related to the employee's past record, the appellate court believed that the employee's alcoholism and tendency towards violent behavior may make the sexual assault by the employee "foreseeable to the employer."

The Duty to Check Criminal Records

One of the most problematic issues related to negligent hiring is determining the extent to which employers should check on the criminal backgrounds of their applicants. Courts usually state that employers have no legal duty to inquire into their employees' criminal record. The case of *Evans v. Morsell* is often used as a precedent for this position. As stated previously, in the case of *Evans*, the Maryland Supreme Court found that "the majority of courts flatly reject the contention...that where an employee is to regularly interact with the public, an inquiry into a possible criminal record is required...If the employer has made adequate inquiry or otherwise has a reasonable sufficient basis to conclude the employee is reliable and fit for the job, no affirmative duty rests on him to

investigate the possibility that the applicant has a criminal record."[21]

The court in *Garcia v. Duffy* went even further by stating that "even actual knowledge of an employee's criminal record does not establish as a matter of law the employer's negligence in hiring him."[22] The courts in both *Garcia* and *Evans*, and their predecessors upon which they relied on, supported their positions by concerns they expressed over the rehabilitative process of "those who had gone astray."

In general, the employer's duty to use reasonable care under the "totality of the circumstances" standard established under *Ponticas* will depend on three factors. First, the court must consider the interest of society, both in encouraging criminal rehabilitation and in providing a remedy for innocent victims of tortious activity. Second, the court must take into account the burden that an investigative duty would impose upon an employer. Finally, the court must analyze the likelihood and severity of possible injury. These factors combine to yield the following general rules.

The *Ponticas* court was correct in holding that the investigative duty of an employer should be greater in an employment situation that subjects the public to the greatest risk of harm from a dangerous employee. The risk is greatest to the public when an employee is allowed to

enter onto another's property solely because he works for the employer. Thus the "totality of the circumstances" standard would require the employer to undertake a thorough investigation to exercise reasonable care.

Generally, the investigative duty should not be as extensive in cases where the employee is closely supervised. This higher level of supervision should decrease the opportunity for a dangerous employee to harm the general public. Therefore the "totality of the circumstances" standard should allow the employer to conduct a less extensive investigation. Further, this will improve opportunities for ex-criminals to obtain employment, thereby furthering the goals of the criminal rehabilitation system.

These general rules do not require the employer's investigative duty to find the impossible. Nor does such a duty require the employer to conduct an exhaustive investigation of the criminal records of all potential employees--so long as the employer has reasonable basis to believe that an individual is not dangerous. These principles are consistent with the concept of holding employers liable only when they are at fault and should, therefore, be adopted in the implementation of the "totality of the circumstances" standard.

An employer can minimize jury hindsight by taking simple steps to help show that he exercised reasonable care under the "totality of the circumstances." The employer

should ask the potential employee about any previous criminal convictions and then consider all factors surrounding the conviction. The employer should also verify and contact all listed references. A reliable reference is someone who is objective and able to evaluate the applicant's employability. Hence, close relatives are not sufficient. A prudent employer will also check the applicant's previous employment history. The employer should be aware of gaps in employment, as well as a history indicating numerous jobs of rather short duration, since these can be trouble signals. Gaps in employment could be due to prison sentences or periods of chemical dependence rehabilitation. Numerous short-term jobs may indicate an inability to follow directions or difficulty accepting orders from superiors. If these trouble signals are present, the exercise of reasonable care should require the employer to investigate the applicant more extensively before hiring him. Finally, an employer can conduct a credit check of the employee and even hire a private investigator. Obviously, an employer will not have to carry out all of these procedures in order to avoid liability in a negligent hiring suit.

It is possible that an employer who extensively investigates potential employees will, nonetheless, be held liable for negligent hiring because of jury hindsight. However, a prudent employer, by carefully investigating

potential employees before hiring them, significantly lowers his risk of liability for failing to use reasonable care under the "totality of the circumstances" in a negligent hiring action.

The moral is clear. An employer's risk of liability rises significantly when evidence of an employee's past criminal record gets before a jury. The conclusion is equally clear that employers ought to conduct criminal record checks, to the extent that they can, at least for employees who will have special access to the dwellings, businesses, or property of customers.

Although *Ponticas* has been criticized for placing a heavy burden on employers,[23] human resource managers should not lightly dismiss it. Instead, it may be a sign that the day is not far off when failure to check criminal records of employees will be enough evidence alone to support negligent hiring liability. Within the last decade, criminal record information has become widely available, and there have been recent developments in the field of criminal record management that may result in much greater public access to criminal records. If so, decisions like *Ponticas* may become recognized as ground-breaking cases. These developments include better technology, greater cooperation among agencies, an increase in authorized access to information, and changes in underlying philosophical concerns. All of these changes have important implications to the theory

underlying the negligent hiring doctrine.

The Availability of Criminal Records

Every state has developed a central repository of criminal records that can provide computerized access to records for criminal justice purposes. Historically, these records were not available as a matter of right to private employers, although some agencies make them available as a matter of discretion. Starting in 1974, however, state legislatures actively began adopting criminal history record legislation, following the regulations established by the Law Enforcement Assistance Administration. For example, in 1974, fewer than half the states had statutes addressing criminal record information dissemination. By 1984, however, nearly every state had such legislation.[24] Although many of these states continued the old policy of denying public access, many states opened up their records to some extent.

Therefore, the availability of criminal records or "rap sheets" to employers varies widely from state-to-state. Generally speaking, most states still impose significant restrictions on the dissemination of criminal record information to non-criminal justice requestors. Several states, including North Carolina and Massachusetts, deny access to private employers completely. Other states will provide employers information for certain specified

background purposes, and a few states allow the general public access to conviction information, with some restrictions. A few states, however, with Florida being the recognized leader, are essentially open record states, allowing the public access to both conviction data and arrest information.[25] Although more states are still more "closed" than "open" regarding their dissemination policies, there is clearly a movement towards more open records among the states.

Other developments at the federal level and in the processes used by record centers are also making criminal record information easier to access and more reliable. At the federal level, a mechanism for obtaining nationwide criminal record information exists through a network system run by the FBI known as the Interstate Information Index (III). Like state record centers, the III System is primarily a tool for criminal justice agencies, one that grew out of centralized filing of arrest records and fingerprints that the FBI began to keep early in its history. In recent years, recognizing the difficulty of maintaining accurate records on all persons arrested in all states, the FBI has moved towards a change in the fundamental character of its system. The III System is now primarily designed to be a pointer system, a network nerve center that refers requestors of information to the central repositories of participating states. Under the system,

participating states then answer the requests for information.

Just like access to the state repository information, access to the III System also depends to a large extent on state law. Under the FBI rules, the Bureau and the states will release information to anyone authorized by state or federal law to receive it. Under limited federal laws, banks, securities trading agencies, are authorized to receive criminal record histories as part of background checks. Under state laws, states can authorize other specific groups to receive III access. However, these state authorization statutes must meet certain FBI standards and must each be specifically approved by the FBI. The trend among states is to authorize state licensed businesses, such as day care, nursery centers, and school systems, clearance to use the III System.[26]

On the technological front, in addition to computerization, which allows greater networking and easier retrieval of information, other new technologies and safeguards increase the accuracy of record searches. One innovation is the Automated Fingerprint Identification System, a computer system that verifies fingerprints, thus eliminating the most labor intensive aspect of record verification.[27] These new techniques answer the fears of many critics about the inaccurate reporting of criminal records.

Technological advances and the recent increased attention focused on criminal record information have also fueled the debate over the extent to which records should be available.[28] The biggest concern of those criticizing open records and of many courts in negligent hiring cases is the rehabilitation of those who have been through the criminal justice system. These critics fear that greater record availability will undermine the efforts to rehabilitate former convicts. As cited in the *Evans* case, support for the notion of rehabilitation of society's criminal offenders is extensive. Some published behavioral research has noted that criminal rehabilitation is effective and the public supports it.[29] Others have labeled rejection of the notion of rehabilitation and support for more open records as "bad democracy."[30]

The piece prepared by the SEARCH Group, Inc., a quasi-governmental research agency, argues convincingly that rates of more than 60 percent demonstrate that rehabilitation does not work well enough to justify closed records.[31] Thus, being confronted by both the public and undermined by scholars, the basis of the rehabilitation ideal may not hold out much longer. If not, then the arguments both for closed records, and for the *Evans v. Morsell*, rationale will be changed. If rehabilitation becomes discredited by the courts, and if criminal record information becomes easily and accurately accessed, a duty to inquire into criminal

history could easily become the norm in employment law.

Defending Against A Negligent Hiring Claim

There are some limits on the possible liability of an employer for negligent hiring and retention claims. Plaintiffs must prove that the negligent conduct of the employer actually caused their injury and this is oftentimes very difficult to do. Many times the inability to prove this connection has resulted in the failure of a negligent hiring claim. While the employer may not have exercised due care in selecting the employee, the failure to do so is often overridden by the independent act of the employee, an act that was not predictable by the employer. Plaintiffs must prove that the hiring practices of the employer were the actual cause of their injuries. In addition, they must prove that the risk of harm to third parties was a foreseeable consequence of the employer's failure to exercise due care in its employment practices.

For example, in the case of *Harrington v. Chicago Sun-Times*,[32] an individual who was employed as a route driver for a Chicago newspaper worked in a dangerous area. He carried a gun for protection in violation of the newspaper's policy. Management was unaware that he was carrying a weapon. While on one of his routes, the driver shot someone who, he believed, was attempting to steal a car. The shooting victim later amended his suit against the driver and the

Minimizing or Avoiding Negligent Hiring Liability

To avoid liability on negligent hiring claims, an employer needs to exercise great caution in hiring decisions. First, a determination should be made concerning how much contact the new employee will have with the public. The contact may consist of access to customer's homes, face to face encounters with the public, or use of a motor vehicle in an employment-related activity. For such positions, background checks, including direct contact with references and former employers, is essential.

Here are some guidelines for keeping investigations within legal bounds:

1. Keep all questioning to job-related matters, in inquiries with both the applicant and third-party sources. State and federal discrimination laws prohibit employers from discriminating against applicants based on inherent characteristics unrelated to job performance, such as age, race or handicap.

2. Look for indications of dishonesty, like misstatements on a resume, not necessarily hard proof of wrongdoing. You often need only to determine if the person is telling the truth, and not the specific details of past activities. Probing for personal and private details of the applicant's life that are unnecessary to judging the loyalty, honesty or competence of the applicant may lead to trouble.

3. Ask the applicant to sign a "global release," a form permitting the employer to check his background and waiving liability on the part of all persons, including past employers, who give information about the applicant. Alternatively, companies can request applicants to sign releases for referrals from specific people or employers as well.[34]

Once an employee has been hired, personnel records should be maintained that adequately reflect the employee's training, job performance, and any incidents that may involve the employee's violent tendencies, criminal acts, or negligence. Proper maintenance of the files is essential in the event of a lawsuit.

Employers should keep in mind that they may be held liable for retaining an employee when giving them a "second chance." It is now a simple legal fact that giving a "second chance" should be considered *very* carefully. The risk of recurring incidents and resulting liability must be weighed against the considerations of sympathy or rehabilitation when making the decision to continue to employ an individual.

Employers should exercise great care in verifying training and/or licensing requirements. If the position calls for some kind of licensing (e.g., security guards, drivers, etc.), then the licensing agency should be contacted to verify credentials. In addition, the employer

should take steps to ensure that employee training is conducted either by the licensing company or the employer himself. In some cases, requiring the employee to complete the company's own training program or at least some kind of refresher course may be necessary and in the best interest of the employer.

Finally, the employer must weigh the risk of possible liability against the cost and difficulty of performing these background checks and maintaining the personnel records. The risk of employer liability stems from the failure to act according to generally accepted practices within one's own profession or trade. In today's business environment, an employer must have safe, complete, and reasonable personnel management practices in order to avoid liability for negligent hiring.

A Short Summary of the Negligent Hiring Doctrine

In summary, negligent hiring is a tort of primary liability. Thus, only a negligent employer is liable. Although the negligent hiring doctrine may be applied in various settings, the need for this tort is greatest in those situations where the employee has access to the victim by virtue of his badge of employment. If state courts or the legislature recognizes the tort of negligent hiring, the following standards should be included to ensure that the tort serves its intended purpose.

An employer should be held liable for negligent hiring

when his failure to use reasonable care is the proximate cause of the employee's tortious conduct that results in injury to a member of the general public. The duty to use reasonable care should be analyzed on a "totality of the circumstances" basis. This takes into account the interests of society, the burden upon the employer, and the likelihood of a serious injury. The employer should be permitted to demonstrate that his investigative procedures were sufficient, or that a reasonable investigation would not have revealed the employee's violent propensities.

The negligent hiring doctrine has resulted in numerous positive effects on the residents of those states that have adopted it. First, financial responsibility is placed upon the entity best able to control and alleviate the risk. Second, the tort of negligent hiring closes a loophole in the doctrine of respondeat superior. Under the doctrine of respondeat superior, when the negligent employer cannot be held liable and the employee's assets are insufficient to reimburse the plaintiff for his injuries, the plaintiff is left without a remedy. Thus, the employer will no longer be able to escape liability for his own negligent actions that proximately cause an injury to a member of the general public.

An additional benefit of recognizing negligent hiring claims is increased public safety. Naturally, employers will attempt to be more careful in their hiring practices to

avoid being held liable for the intentional torts of negligently hired employees. This should result in fewer dangerous individuals having contact with unsuspecting consumers, thereby increasing public safety.

Finally, where the tort is recognized it provides guidelines for the employer, so that he knows how to minimize his potential liability for negligent hiring. This avoids the problem of imposing liability on an employer who honestly believed that he acted in accordance with the law.

Conclusions and Recommendations

In order to avoid negligent hiring liability, any employer with employees that have access to the property or persons of clients or customers should conduct criminal record checks to the extent possible. Presently, the laws of states regarding access to information vary widely. Some states have restrictions on the use of criminal records in hiring decisions. Also, under interpretation of Title VII of the Civil Rights Act of 1964, employers are prohibited from using arrest records in making any employment decision. However, many states do provide at least some records, and to be truly careful, employers should request records from every state in which the applicant has lived. As *Ponticas* shows, such a procedure is especially important when there appears to be gaps in employment history, or questionable references, or other suspicious factors in a job applicant's file. This will of course be a burden on employers.

However, considering the large awards that plaintiffs have won in some recent negligent hiring suits, such a burden should be viewed as a necessary business expense.

As a matter of public policy, I agree with other authors on this subject in that Congress should pass legislation making nationwide criminal record checking available to certain types of employers through the FBI's III System. If well drafted, such legislation would promote public safety, while at the same time balance the goal of rehabilitation. The legislation should authorize access only to certain types of employers, such a patient care facilities, child care facilities, landlords, and common carriers who hold their employees out to the public in positions of trust. This legislation would only parallel the present access statutes currently have, such as making records available to banks and securities firms. In addition, the legislation should require identification procedures, which would insure against false reports and provide for removal procedures for minor offenses or very old records. Thus ex-convicts who remain clean for a long period of time would not be penalized for their past all of their lives, but employers and the public would not have to suffer the likelihood of repeat offenses.

The management issue of 'negligent hiring', 'background and reference checks' and 'workplace privacy' may seem unmanageable, complex, and even contradictory. The research

I have presented may serve as guidelines for implementing human resource policies and procedures to safeguard employers from the potential liability of negligent hiring, invasion of privacy and violation of other relevant state and federal laws.

Endnotes

1. States that recognize the negligent hiring doctrine include: Alabama, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, Utah, Washington, and the District of Columbia.

2. Michael Silver, "Negligent Hiring Claims Take Off," *ABA Journal*, May 1, 1987, p. 72.

3. *Anspach v. City of Livonia*, 364 N.W.2d, 336 (1985).

4. *Janice v. Hodzinski*, 439 N.W.2d, 276 (1989).

5. *Wiper v. The Downtown Development Corporation of Tucson*, 732 P.2d 200 (S.Ct. Ariz. 1987).

6. *Missouri K & T Railway Company of Texas v. Day*, 136 S.W. 435 (1911).

7. *Plains Resources, Inc. v. Gable*, 682 P.2d 653 (Kan. 1984).

8. *Foster v. Loft, Inc.*, 526 N.E.2d 1309 (Mass. App. Ct. 1988).

9. *Lindsey v. Winn Dixie Stores, Inc.*, S.E.2d 1375 (Md. App. 1984).

10. *Henley v. Prince George's County*, 479 A.2d 1375 (Md. App. 1984).

11. *Ibid*, p. 1376.

12. *Chapman v. Black*, 741 P.2d 998 (Wash. App. 1983).

13. *Gaines v. Monsanto Co.*, 655 S.W.2d 568 (Mo. App. 1983).

14. *Cramer v. Housing Opportunities Commission*, 482 A.2d 156, (Md. App. 1984).

15. *DiCosala v. Kay*, 450 A.2d 508 (NJ. 1982).

16. *Evans v. Morsell*, 395 A.2d 480 (1978).

17. *Doe v. Am. Airlines*, Daily Lab Reporter, 173 (1986).

18. *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907 (Minn. 1983).

19. *Evans v. Morsell* (cited in note 16).

20. *Pittard v. Four Seasons Motor Inn, Inc.*, 668 P.2d 333, (N.M. App. 1984).

21. *Evans v. Morsell* (cited in note 16).

22. *Garcia v. Duffy*, 192 So.2d. 435 (Fla. App. 2 Dist. 1986).

23. "Employer Liability for the Criminal Acts of Employees Under Negligent Hiring Theory: *Ponticas v. K.M.S. Investments*," 68 *Minnesota Law Review* 1303, (1984).

24. SEARCH Group, Inc., *Public Access to Criminal History Record Information*, U.S. Department of Justice, Bureau of Justice Statistics, November 1988, p. 7-8.

25. *Ibid*, p. 11-12.

26. National Crime Information Center, *Computerized Criminal History Program, Background, Concepts and Policies*, U.S. Department of Justice, March 1, 1984.

27. P.E. Leuba, "Demand for Criminal History Records by Noncriminal Justice Agencies," *Open vs. Confidential Records*, U.S. Department of Justice, November 1988.

28. *Ibid.*

29. F.T. Cullen and K.E. Gilbert, *Reaffirming Rehabilitation* (Cincinnati: Anderson, 1982).

30. F.T. Cullen et. al., "Is Rehabilitation Dead? The Myth of the Punitive Public," 16 *Journal of Criminal Justice*, 1988, p. 303-317.

31. Search Group Inc. (see note 24).

32. *Harrington v. Chicago Sun-Times*, 502 N.E.2d 332 (Ill. App. 1 Dist. 1986).

33. *Leach v. Newport Yellow Cab*, 625 F.Supp. 377 (S.D. Ohio 1985).

34. Felix J. Springer and Albert Zakarian, "Managing with Employment Background Checks, *Pension World*, June 1990, p. 15.